

John Neilson, of Chappell, Esq; - - Appellant; Case 125.

John Murray, of Conheath, Esq; - - Respondent. Edgar,
22 Jan.

1725.

16th Feb. 1725-6.

Papist. — *Jus tertii.*—An estate descends to two heirs portioners; the eldest a Papist, by her first marriage, has a son, a Protestant; in a contract on her second marriage she covenants to settle the estate on her husband and the heirs male of that marriage. After her second husband's death, the eldest son of that marriage, a Papist, grants a disposition of the estate to a third party: no titles had been hitherto made up by this son of the second marriage, nor by his mother; but the disponent now gave them a charge to enter heirs, and thereupon got adjudication. It was not *jus tertii* to the Protestant heir of the first marriage to object against this disposition.

Papists on whom the succession to heritable subjects devolved before the act 1700, were nevertheless precluded from serving heirs after that act passed without taking the *formula*.

An *onerous* purchaser from a Papist could not be in a better situation than the Papist himself.

A person *popishly educated*, who never took the formula, held to be a Papist.

An objection that a question was not moved of the disponent's Popery, and that he never was required to take the formula during his life, is repelled.

The act of parliament 3 G. 1. c. 18. did not extend to Papists in Scotland.

THE respondent, in 1718, brought an action before the Court of Session for reduction of several deeds, by virtue of which the appellant claimed the property of part of the lands of Conheath. The circumstances of the case, as stated by him, were,

That Alexander Maxwell, of Conheath, the respondent's grandfather, died in 1655, seized of the lands of Conheath, leaving two daughters, Elizabeth and Margaret, his heirs portioners; Elizabeth, the eldest daughter, was popish, and in 1671, intermarried with Gilbert Murray of Urr; and had issue the respondent, a Protestant, and James, a Papist:

That after Gilbert Murray's death, Elizabeth, his widow, in 1688, intermarried with Gilbert MacCartney, and by the marriage contract Elizabeth (though never served heir to her father, nor in feist in the said lands of Conheath) conveyed all right she had to her half of the estate to the said Gilbert MacCartney and herself, "in conjunct fee and life-rent, and the survivor of them, and the heirs of their bodies, begotten of the future marriage, which failing"—then followed a blank never filled up:

That the said Gilbert MacCartney died in 1695, leaving issue of that marriage, William, since deceased, a Papist, and Margaret still alive, and also a Papist: and the mother, designing to exclude the respondent, her eldest son, from the said estate, because of his being a Protestant, executed a deed, reciting her right of inheritance of the said estate, and thereby conveyed the same to her younger son of the first marriage, James, a Papist; and this James afterwards procured a disposition from William MacCartney, the son of the second marriage, who had not been served heir to his father, nor of that marriage, conveying all

right and interest, which he had to the said lands of Conheath, by virtue of the marriage-contract betwixt his father and mother, to one William Alves, a Protestant, but in trust for the said James Murray, a Papist: this disposition was dated in 1711; and Alves thereupon raised and executed letters of general and special charge against William MacCartney as heir of the said marriage, and against the said Elizabeth Maxwell as heir portioner to her father; an adjudication was obtained thereupon, and, on the 19th of May 1715, Elizabeth, the mother, ratified the said adjudication, and disposed to the said William Alves her right of life-rent, and all right and title she had or could claim to the said estate, without regarding her former disposition to James Murray, in order, so far as was in her power, to disinherit the respondent:

That the respondent was, in 1717, served Protestant heir to Alexander Maxwell his grandfather, as last seised in the said lands of Conheath; though his service was opposed by his mother, and by Robert Murray, son of the said James Murray then deceased, as well as by the appellant, who then stated his title to the estate on the ground of an agreement on the part of Alves to convey to him: and after the respondent's service, a disposition was granted by Alves to the appellant, on the 28th of December 1717 (a).

The respondent founded his action on the act of the parliament of Scotland 1695, c. 26. intituled, "Act discharging popish persons to prejudge their Protestant heirs in succession;" and on the act 1700, c. 3. intituled, "Act to prevent the growth of Popery," in so far as the incapacity of a Papist to succeed or convey to a gratuitous disponee was involved in it. He contended, therefore, that the conveyance and title granted by William MacCartney to Alves, under which the appellant claimed, was void, William MacCartney being a Papist, and the same being in prejudice of the Protestant heir.

The appellant, at first, in defence, contended that it was *jus tertii* to the respondent to object against the conveyance in question, this being only competent to the Protestant heir of Gilbert MacCartney, the father of William; for that the respondent's mother divested herself of the fee of the estate in favour of her second husband MacCartney in 1688. The Court, on the 10th of July 1722, repelled the objection of *jus tertii* made by the "appellant; and found that it was competent for the respondent to object against the disposition made by William MacCartney to Mr. Alves, or any other of the grounds of the adjudication."

The appellant next contended, that the estate descended to William MacCartney before the act 1700 was passed, and so was not comprehended under it. He stated, too, that he and Alves, his author, were *bona fide* purchasers from William MacCartney long be-

(a) Though not stated in the cases, it would appear that Elizabeth, the respondent's mother, was dead when this action was commenced.

fore the respondent claimed any title as Protestant heir. After answers on this point, the Court, on the 14th of December 1722, “ Found that by the act of parliament 1700, Papists at or after their age of 15 years, are disabled to succeed by serving themselves heirs in lands or other heritage after the date of that act, as well where the fee of the said lands, &c. had opened by the decease of the predecessor last infest, before the date of the said act of parliament, as where the predecessor survived that time; and found that the appellant, by being an onerous purchaser, could not be in a better case than MacCartney, the alleged Papist, from whom the appellant’s right was by progress derived.” And to this interlocutor the Court adhered on the 8th of February 1723.

The appellant afterwards craved and obtained a proof; and, after advising the same, the Court, upon the 14th of November 1724, “ Found it proved that the said William MacCartney was Popishly educate, and found no evidence that he took the formula in terms of the act of parliament.”

The appellant reclaimed, contending that it did not appear that William MacCartney had been educated in the Popish religion in terms of the act 1700; that the question could not be stirred after his death; and that the appellant’s title was saved by the act 3 G. 1. c. 18. in favour of Protestant purchasers. After answers for the respondent, the Court, on the 4th of December 1724, “ Adhered to their former interlocutor, reserving the consideration of the other parts of the bill.” And upon the 23d day of January 1725, they “ repelled the objection, that a question was not moved of MacCartney’s being a Papist, and not having taken the formula during his life; and repelled the objection upon the act of parliament 3 G. 1. in favour of Protestant purchasers.”

The appeal was brought from “ several interlocutors or decrees of the Lords of Session of the 10th of July and 14th of December 1722, the 8th of February 1723, the 14th of November and 4th of December 1724, and 23d of January 1725.”

Entered,
6 Feb.
1724-5.

Heads of the Appellant’s Argument.

The full and absolute property of the said estate was vested in the said Elizabeth Maxwell at the time of her contract of marriage with the said Gilbert MacCartney; and she having by the contract, no less than 36 years ago, conveyed the same for a valuable consideration to and in favour of the said Gilbert MacCartney, and the heirs of the marriage, the fee of the said estate devolved absolutely upon the said William MacCartney after his father’s death, long before the act of parliament 1700. He conveyed the fee which was in him, and his mother conveyed her life-rent, and all other interest and title she was possessed of, to Alves, the appellant’s author, for a full and valuable consideration: and a legal title to the estate was established in the person of Alves, with infestment and registration, long before any claim was made, or mentioned to be made, by the next Protestant heir.

Though the respondent, therefore, were next Protestant heir to the said William MacCartney, which he is not, and though William had not succeeded till after the act 1700, and had actually been convicted of Popery, yet the respondent cannot pretend as next Protestant heir to overturn the title of the appellant.

The respondent is so far from being next Protestant heir to the said William MacCartney, that he is in no way related, either to him or to his father Gilbert, to whom the estate belonged; and therefore he has no title to object Popery to the said William, or to any person deriving right from him.

The right of William Alves to the said estate of Conheath was set up and produced against this very respondent upwards of ten years ago, in a former action, brought by the respondent for establishing his right to the said estate; and all the pretences of the respondent were then set aside; though he had as much right at that time as he has now to enter as next Protestant heir. The title of the appellant's author Alves was made public by adjudication prior to, and was saved by a proviso in the act 1700, and by the act 3 G. 1. c. 18. in favour of Protestant purchasers.

No. 35. of
this collection,

Heads of the Respondent's Argument.

The estate in question belonged to the respondent's grandfather, to whom he was served heir. Elizabeth, the respondent's mother, never having been served heir to her father, had no title in her person, and consequently could make no conveyance to MacCartney her second husband. And although such conveyance had been effectual, yet MacCartney was never infeft in these lands, nor did William his son serve heir of provision to him; consequently neither father nor son having a title, the son could make no conveyance to Alves. Besides, the conveyance made by the respondent's mother to MacCartney does not entitle him to the fee of the lands, but only to the rents and profits during his life, and to the heirs to be procreate betwixt them, &c. Even though there had been a title in the person of Gilbert MacCartney, yet William his son had no right; for Agnes MacCartney, daughter of the first marriage, who was a Protestant, was served heir to her father, and thereby the right established in her person, and she conveyed the same to the respondent. The respondent, therefore, had an undoubted title to call in question any conveyance that could be made by any of them.

The words of the act 1700 are express "That no person professing the Popish religion, past the age of fifteen years, shall be capable to succeed to any person whatsoever." This is in other words to say, "That no Papist shall hereafter be capable to serve as heir, to any person whatsoever," because till such service, the estate is not fully vested in the person succeeding. And therefore it follows, that though the person last seised died before the act 1700, yet the next in succession *not being served heir* before that time, he was rendered incapable to serve after the passing of that law.

Nor

Nor can there be any *bona fides* in this case; for if William MacCartney's right be null, the title flowing from him can be no better; especially where the appellant is not a purchaser on the faith of any thing upon record, but is only purchaser of a right *remaining personal* from an apparent Popish heir, who died without establishing any title in his person. And, besides, in this case the appellant, before his purchase, had notice of the respondent's claim, and of his serving heir to his grandfather.

The act 1700 also enacts, "that if any person or persons educate in the Popish religion shall happen to succeed as heirs to their predecessors, or any conveyance shall happen to be made in their favour from a person to whom they might succeed as heirs before they attain the said age; then and in either of these cases, they shall be holden and obliged to purge themselves of Popery before they attain the age of 15 years, by the formula" therein mentioned. "And if they *neglect or omit* to renounce Popery as aforesaid, then and immediately thereafter their right and interest shall become void and null, and shall devolve and belong to the next Protestant heir or heirs," &c. By the words "educate in the Popish religion," is meant, one residing in a family with his Popish parents, under their influence, instruction, and example. This was the case of William MacCartney; all his right to the estate devolved to him before his age of 15, and it is proved, that he was born of Popish parents, and lived in the family with them till he was 15 years of age; that he was habite and repute a Papist during his abode in Britain, which was till his age of 21 years, and it did not appear that he ever took the formula.

Nothing is more certain, than that inquiry may be made even after the death of the person whose right is voided, whether he was in his lifetime under the incapacity mentioned in the said act. And there was no necessity for *requiring* William MacCartney to take the *formula*; for the act 1700 declared, that if he *neglected or omitted* (not if he *refused*) to take the *formula*, his right should be null, and should devolve upon the next Protestant heir. The appellant, therefore, should have proved that MacCartney did renounce Popery in terms of the act; but this he did not so much as attempt.

The act 3 G. 1. c. 18. relates only to disabilities arising from the acts concerning Papists in England; but has no reference to the acts of parliament in Scotland. Besides, the appellant has not made the least proof of any valuable consideration given for his purchase.

Nor can the appellant derive any advantage from the decision in the former appeal; that was merely a question between the respondent and his mother, and younger brother, a Papist, in whose favour the mother wished to disinherit the respondent. It consisted solely of this point, Whether the respondent had a right to the premises during the lifetime of his mother? for the several conveyances were only held in trust for the respondent's younger brother; and though the premises were then adjudged to the

respondent's mother, in preference to him, still he is not thereby precluded from insisting in the present question after her death.

Journal,
16 Feb.
1725-6.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutors or decrees therein complained of be affirmed.*

For Appellant, C. Wearg. Dun. Forbes. Cha. Erskine.
For Respondent, C. Talbot. Will. Hamilton.

In this case both parties enter into a discussion of the proof led of Wm. MacCartney's Popery; but nothing can be distinctly stated thereon.

Case 126. Sir John Schaw, of Greenock, Bart. - *Appellant* ;
Dame Margaret, the Widow of Sir John
Houston, Bart. Sister of the Appellant - *Respondent*.

2d April 1726.

Presumption.—Intromission with the Settlements of a Person deceased.—Proof—In a reduction of a mother's settlements brought by her son and heir, against a sister, who was benefited by them, on the ground that the sister had access to the repositories of the deceased, and took what she chose, and might have destroyed the rest; the sister stated in defence that the deeds had been given to her by her mother: it was necessary for the pursuer to prove that the defender's intromission was unwarrantable.

The deeds produced were presumed to contain the last will of the deceased.

A circumstantial proof, brought by the pursuer, that the deceased had declared that she had made other settlements, and of embezzlement on the part of the defender, found insufficient.

BY a contract, executed in April 1677, previous to the marriage of Sir John Schaw and Helenor Nicholson, the father and mother of the appellant and respondent, in consideration of the then intended marriage, and of the portion of Dame Helenor, (which was very considerable), the lands of Easter Greenock were settled upon her in life-rent, for her jointure; and she was likewise provided to the life-rent of one-third of all the real estate, which should be acquired by Sir John during the marriage, and to one-third of all the household furniture.

After the marriage, the lands of Carnock and Plain descended to the said Dame Helenor and her two sisters, as heirs portions; the yearly value of the whole being about 833*l.* 6*s.* 8*d.* sterling.

By articles of marriage, in March 1700, between the appellant and Margaret, the daughter of Sir Hugh Dalrymple, President of the Session, it was agreed that the said lands of Easter Greenock should be settled upon the appellant and his then intended wife; and accordingly Dame Helenor released the same of her life-rent. By another deed, of same date, Sir John, the father,
in